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No._____

In the

Supreme Court of the United States

Francisco C. Zamora

Petitioner,

v.

Peter D. Keisler, Acting Attorney General of the United States

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Effective April 1, 1997, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which repealed §212(c) of the Immigration and Nationality Act ("INA), a waiver available to aliens convicted of any criminal offense so long as a sentence of 5 years or less was served. §304(b), IIRIRA. Congress replaced it with §240A, a more restrictive criminal waiver provision which limited it to only those few felonies which fall outside of the INA's definition of an "aggravated felony" at INA §101(43) and misdemeanors. And, further, §240A restricted the waiver to those aliens who did not commit a crime of moral turpitude within the first 7 years of obtaining any legal status, whether a felony or misdemeanor, another consideration not relevant under §212(c). *See*, 8 U.S.C. §1229b(a)(2), INA §240A(a)(2). This Court in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001) held that where an alien was convicted by a plea of guilty to an offense prior to IIRIRA's effective date, it would be improper for the Attorney General to retroactively apply the repeal of §212(c) under §304(b) of IIRIRA, thus making those aliens who plead guilty to their offenses prior to the effective date of §304(b) of IIRIRA eligible for a §212(c) waiver.

In *St. Cyr*, this Court found that the alien's plea of guilty carried with it a presumed reliance upon the prior law such that it would impose a "severe and obvious retroactive effect" for a court to find that the alien would be ineligible for a §212(c) waiver. *Id.*, at 325, 121 S.Ct. 2271. Thereafter, a majority of the circuit courts of appeals, focusing upon this Court's language concerning "reliance" in St. Cyr, have required that an alien demonstrate a "reliance interest" upon the prior law in

order to be eligible to claim any right or benefit thereunder. In most instances, this has been in the form of a plea of guilty. Two courts of appeals, however, have rejected this approach altogether and have required the demonstration of no reliance at all, such that, had Petitioner's case arisen in one of those circuits, he would have been entitled to the §212(c) waiver.

This case presents the following question of law:

When the Petitioner exercised his right to trial in a criminal case in 1995, and for which he was convicted and sentenced to 24 months probation, whether his exercise of his right to trial – or his failure to otherwise demonstrate any prior purported reliance upon receiving relief under §212(c) – should make him ineligible for a §212(c) waiver, under which a fair reading of this Court's precedent concerning the improper reach of retroactive statutes, he should have been entitled, regardless of whether he exercised his right to trial or entered a plea of guilty?

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Opinion Below

The opinion of the court of appeals (App. 1 – 8, *infra*) is unreported, but available at Westlaw, 2007 WL 2030599.

Jurisdiction

The judgment of the court of appeals was entered on July 16, 2007. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

Sixth Amendment to the U.S. Constitution; 8 U.S.C. §1182(c), INA §212(c) (West, 1996); 8 U.S.C. §1231(a)(5), INA §241(a)(5), (West, 2006); and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 304(b), which are reproduced in the Appendix (App. 9 – 10).

Statement of the Case

The facts relevant to Petitioner's appeal were never in dispute. The Petitioner, Francisco Zamora, a legal permanent resident since 1985, was placed into immigration proceedings in 2001, as a result of being denied readmission into the United States after a vacation to Mexico for prior Illinois convictions of possessing a stolen vehicle in 1990 and cocaine possession in 1995. At his immigration hearing in 2005, the Petitioner requested a waiver of inadmissibility under 8 U.S.C. §1182(c), INA §212(c) (1994) (repealed), arguing that its repeal under Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), (eff. April 1,

1997), should not be applied retroactively. The immigration court held that, consistent with its reading of *I.N.S. v. St. Cyr*, 121 S.Ct. 2271 (2001), the Petitioner was ineligible for a waiver under §212(c) of the 1995 possession of cocaine offense because he did not plea guilty to it, but was found guilty after trial.

The Petitioner filed a timely Petition for Review at the Seventh Circuit Court of Appeals under 8 U.S.C. §1252. The Petitioner conceded that he was ineligible for cancellation of removal under §240A of IIRIRA, not because he committed an aggravated felony, but because his 1990 offense occurred within 7 years of his admission as a legal permanent resident in 1985, thus breaking the required "continuous residence" period. 8 U.S.C. §1229b(a)(2), (d)(1), (West, 2004) ("any period of continuous residence . . . shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) . . . .") The Petitioner's only avenue for relief was under the repealed §212(c).

Although the case obviously never reached the merits under §212(c), it did not go unnoticed by the Seventh Circuit that the Petitioner's case presented favorable discretionary factors. The Petitioner was not disqualified for relief under §240A for commission of an "aggravated" felony under 8 U.S.C. §1101(a)(43). 8 U.S.C. §1229b(a)(3) (West, 2004). Further, the Petitioner was never incarcerated for either of his offenses, but was placed on probation for each offense. Decision, (App.) Further, other favorable factors with respect to the Petitioner were that he was 42 years old, has two United States citizen children, aged 23 and 8 years old, plus two grandchildren, and has worked at the Advance Wheel Corporation since 1989, and serves as an usher in his

church. It cannot be said, therefore, that he would not be without some chance of prevailing upon a §212(c) waiver if he were, indeed, deemed eligible for one. The court of appeals, however, held that IIRIRA was not impermissibly retroactive as to the Petitioner because he failed to plea guilty to his 1995 cocaine possession offense, saying "[w]e have since foreclosed the possibility of §212(c) relief for an alien who did *not* plead guilty to an aggravated felony prior to IIRIRA, reasoning that he 'did not abandon any rights or admit guilt in reliance on continued eligibility for §212(c) relief." Decision, (App. 5) (emphasis in original) (*quoting, Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004)).

The Petitioner argued that this reading of this Court's decision in *St. Cyr* was too restrictive, especially in light of this Court's decisions in other factual contexts in which retroactivity was in issue. With respect to the issue of whether the particular alien in *St. Cyr* had a "reliance interest," the Court discussed the likelihood of a *quid pro quo* in obtaining a plea, *id.*, at 321, S.Ct. at 2291, and in light of the benefit that prosecutors obtained from the plea, it would be contrary to "'familiar considerations of fair notice, reasonable reliance, and settled expectations' to hold that IIRIRA's subsequent restrictions deprive them of any possibility of that relief [under §212(c)]." *Id.*, at 323-24, S.Ct. at 2292 (*quoting, Landgraf*, at 511 U.S., at 270, 114 S.Ct. 1483). But, under the facts of the case presented in *St. Cyr*, the Court made it clear that other circumstances may exist in which a party may claim illegal retroactive effect of IIRIRA, even without a plea of guilty, when it said that "[b]ecause respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to trial,

the elimination of any possibility of §212(c) relief by IIRIRA has an *obvious and severe retroactive effect*." *Id.*, at 325, S.Ct. at 2293 (emphasis added). By saying that applying the new law would have an "obvious and severe retroactive effect" indicates, quite clearly, that in the spectrum of retroactivity cases which could be litigated, that *St. Cyr* presents a more serious one, while less serious ones may also demonstrate an improper retroactive effect of the applicability of IIRIRA. As demonstrated below, two courts of appeals would have accepted the Petitioner's argument.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Ruling Conflicts With Decisions of Other Courts of Appeal on an Important, But Unsettled, Federal Question.

A. The Petition Presents an Important Federal Question.

The Petition presents an important federal question because there is a clear conflict among the circuits concerning whether an alien must demonstrate reliance upon a prior law in order to be entitled to its benefit. A majority of the courts of appeals have required reliance upon prior law, whether presumed in the form of a plea of guilty or otherwise, which has undermined the fundamental principles set forth in *Landgraf* and other Court precedent concerning the retroactivity of new statutes.

This case also presents an important federal question because resolution of this case in Petitioner's favor will have an ameliorative affect upon aliens for many years. According to the Annual Report for the Department of Homeland Security, November 2006, "Immigration

Enforcement Actions: 2005," DHS removed 89,406 criminal aliens from the United States for the fiscal year 2005. It would be a conservative estimate to say that 2 – 3 percent of those claims involved persons who could have received §212(c) relief if it were not for receiving convictions as a result of exercising their right to trial before April 1, 1997.[1] At 2 percent, that would have been 1,788 cases for only 2005. Given the government's recent efforts to discover and remove criminal aliens, especially by improving computer recognition technology for the United States Customs and Border Protection ("USCBP") at the airports, and by authorizing local enforcement agencies to issue notice to appear to aliens, such as Waukegan Police Department in the State of Illinois, it may be anticipated that the government will continue to uncover persons with criminal convictions at an even greater rate for the next few years. And it may be anticipated that even if a small percentage of them are for offenses that pre-date IIRIRA, it will still be a substantial number of persons whose lives will be serious disrupted, or even destroyed, in the process. It is important to note, moreover, that an alien's eligibility for a waiver under §212(c) does not mean that he or she is entitled to it – for those aliens whose crimes were too

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[1] This Court, in *St. Cyr*, cited a Bureau of Justice Statistics report which stated that 90% of all criminal convictions were obtained by plea agreements. *Id.* at 323, n. 51. It would mean, conversely, that 10% are resolved after a trial. It is not unreasonable to conclude that a mere 2 – 3% of the 10% figure would be for convictions which were received prior to April 1, 1997, in light of the government's recent investigation and enforcement efforts.

serious, or for those who the Attorney General finds has not been sufficiently rehabilitated since their last offense, the Attorney General is authorized to deny the waiver with broad and unreviewable discretion.

B. The Courts of Appeals Are Clearly Divided on the Applicability of this Court's Retroactivity Analysis in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001).

In *St. Cyr*, the Court relied upon a considerable history of Court precedent concerning the applicability of retroactive statutes, the most prominent of which were this Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998 (1997). Relying upon this precedent, the Court in *St. Cyr* formulated the rule to be applied as follows:

> The inquiry into whether a statute operates retroactively demands a commmonsense, functional judgement about 'whether the new provision attaches new legal consequences to events comlpteted before its enactment.'" *Martin*, 527 U.S., at 357-358, 119 S.Ct. 1998 (quoting *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483). A statute has a retroactive effect when it " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *Id.*, at 269, 114 S.Ct. 1522 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767, No. 13,156 (C.C.D.N.H. 1814) (Story, J.)). As we have repeated counseled, the judgment whether

> a particular statute acts retroactively "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U.S., at 358, 119 S.Ct. 1998 (quoting *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483).

St. Cyr, at 321, 121 S.Ct. 2271.

Based upon this reading of the law, this Court made certain findings; in particular, that "people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past.'" *Id.* at 321, S.Ct. 2291 (*quoting, Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Further, this Court pointed out that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government," *id.*, which involves exchanging "their constitutional rights (including the right to trial) and grant the government numerous 'tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources'" *Id.* at 322, 121 S.Ct. 2271, *quoting, Newton v. Rumery*, 480 U.S. 386, 393 n.3, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). Lastly, the Court found that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* The Court concluded these findings by saying that

> Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving §212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that

> likelihood in deciding whether to forgo their right to trial, the elimination of any possibility of §212(c) relief by IIRIRA has an obvious and severe retroactive effect.

St. Cyr, at 325, 121 S.Ct. 2271 (emphasis added).

Subsequent to *St. Cyr*, a majority of courts of appeals applied the facts of *St. Cyr* literally, *i.e.*, by refusing to permit §212(c) relief to any aliens except those who, prior to IIRIRA, entered pleas of guilty to their offenses. *See, Dias v. I.N.S.*, 311 F.3d 456 (1st Cir. 2002), *Rankine v. Reno*, 319 F.3d 93 (2nd Cir. 2003), *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006), *Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005), *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004), *LaGuerre v. Reno*, 164 F.3d 1035, (7th Cir. 1999), *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002), *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006), *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002), *Alexandre v. U.S. Att'y. Gen.*, 452 F.3d 1204 (11th Cir. 2006).

Other courts of appeals have rejected this narrow approach, not limiting its retroactivity analysis merely to *St. Cyr*, but also relying upon this Court's decisions in *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994) and *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998 (1997). *Atkinson v. Attorney General of the United States*, 479 F.3d 222 (3rd Cir. 2007), *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). In *Atkinson*, the court held that,

> IIRIRA attached a new legal consequence to Atkinson's conviction: the certainty – rather than the possibility – of deportation. Such a change in legal consequences based on events

> completed before IIRIRA's enactment constitutes an impermissible retroactive effect.
>
> We emphasize that the important "event" to which IIRIRA attached a new legal consequence was the conviction. The fact that Atkinson was not offered a plea and did not engage in a *quid pro quo* exchange is not the event which triggered his inability to seek relief. Applying IIRIRA's repeal of 212(c) retroactively affected aliens because of the *conviction* for an aggravated felony. This is clear because, regardless of whether the conviction resulted from trial or plea, IIRIRA's repeal of section 212(c) had the same impact – the repeal did not attach any different legal consequences to a conviction based on a bargained plea than it did to a conviction following trial.

Atkinson, at 230 (citations omitted) (emphasis in original). In *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004), the court said:

> we believe reliance, in any form, is irrelevant to the retroactivity inquiry. To the extent that it could or should be understood as required in order to establish impermissible retroactive effect however, we would insist at most upon objectively reasonable reliance (as opposed to the subjective reliance proposed b the government and dissent). This said, we must admit that it is unclear to us in what circumstance, if any, "reasonable reliance" inquiry will (or at least should) yield a conclusion different from that reached by Justice Story's framework.

Id. at 396 (citations omitted). Accordingly, the court held that "IIRIRA is impermissibly retroactive because it indisputably attached new legal consequences to [the alien's] decision to plead guilty." *Id.*

II. The Court of Appeals Decided an Important Federal Matter That Has Not Been, But Should Be, Settled by This Court.

In Petitioner's case, the court of appeals held that

> We have since foreclosed the possibility of §212(c) relief for an alien who did *not* plead guilty to an aggravated felony prior to IIRIRA, reasoning that the "did not abandon any rights or admit guilt in reliance on continued eligibility for §212(c) relief."
>
> * * *
>
> Zamora argues that the only relevant question is whether IIRIRA impaired the rights he possessed at the time of his conviction or increased his liability for past convictions. But under that formulation *all* aliens convicted of crimes prior to IIRIRA who otherwise would have been eligible for §212(c) relief would remain eligible, regardless of how their convictions were obtained. Thus, Zamora's retroactivity test would render moot virtually all of the Supreme Court's analysis in *St. Cyr* and require us to overturn *Montenegro*. Zamora has not persuaded us to do so, nor has he argued for an exception to *Montenegro* that would be consistent with our precedent.

Decision, App. 5, 7 (emphasis in original). The court of appeals in Petitioner's case is consistent with the majority insofar as it denied relief absent a plea of guilty to his offense.

A. The Majority of the Courts of Appeals Have Misinterpreted this Court's Precedent

A majority of the courts of appeals have required reliance in light the Court's language in both *St. Cyr* and *Landgraf* that courts should be informed by "familiar considerations of fair notice, ***reasonable reliance***, and settled expectations." *St. Cyr*, 533 U.S., at 321, 121 S.Ct. 2271, *Landgraf*, 511 U.S., at 270 (emphasis added). This emphasis on reliance, however, is misplaced. The language above, found in *Landgraf*, concludes with the words "offer sound guidance," meaning that these considerations should offer guidance. *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483. This means that these considerations are secondary to the main principle that a statute has a retroactive effect when it " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *St. Cyr*, at 321, 121 S.Ct. 2271 (*quoting, Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767, No. 13,156 (C.C.D.N.H.) (Story, J.). Furthermore, there is nothing in this Court's precedent which indicates that reliance upon prior law should be a condition precedent to finding that a statute is impermissibly retroactive. *See, Atkinson, Olatunji, supra.*

In *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), the plaintiff filed a complaint for sexual harassment including a count for constructive discharge

under Title VII. *Id.*, at 248, 114 S.Ct. at 1488. After a bench trial the district court found that the plaintiff had been sexually harassed, but dismissed the plaintiff's claim of constructive discharge. *Id.* While the petitioner's case was pending on appeal, the Civil Rights Act went into effect, which created a new right to a jury trial on damages, as well as wholly new compensatory and punitive damage provisions which would have attached to her constructive discharge claim under Title VII. *Id.*, at 249, 114 S.Ct. at 1489 – 90. After holding that the punitive provision could not possibly be retroactive, the Court said with respect to the new compensatory damage provision that it "resembles a statute increasing the amount of damages available under a preestablished cause of action [that] would . . . undoubtedly impose on employers found liable 'new disability' in respect to past events." *Landgraf*, at 283, 114 S.Ct. at 1506 – 07. The Court held that the new compensatory damage provision would not only "impact private planning," but would also "attach an important new legal burden to that [prior] conduct" to the Title VII defendants. *Id.* at 283, 282, 114 S.Ct. at 1483. That was apparently enough legal basis for the Court to reject retroactive application of the amendments allowing compensatory damages under Title VII. There was no mention of reliance on a prior law in order to find that the new statute in that case was impermissibly retroactive.

In *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998 (1997) the Court was presented with new legislation, Prison Litigation Reform Act of 1995 ("PLRA"), which reduced the pay rate for attorneys who had previously prevailed in prisoner litigation and were currently engaged in post-judgment monitoring and, thus, had on-going bills

submitted to the state on a semi-annual basis. *Id.*, at 346, S.Ct. at 2001. The PLRA was passed in the midst of semi-annual award to the attorneys. The state argued that the reduced pay applied retroactively to all services contained in the latest bill, even if rendered prior to the enactment of PLRA. The attorneys argued that the PLRA did not apply at all because the cases upon which they were based were filed prior to the enactment of PLRA. The Court held that the new rates would not apply retroactively to services rendered before the Act's passage, but that neither would the attorneys be able to avoid the reduced rate after the Act's passage.

In holding that the fee provision should not be applied retroactively, the Court in *Martin* said that the attorneys "had a reasonable expectation" that they would be compensated under the old rule and, further, that "they worked in reasonable reliance on this fee schedule." *Id.*, at 358, S.Ct. at 2006. While the Court did, in this instance, mention that the unfairness of retroactivity would affect the expectation of the parties involved, the Court did not lose sight of the general principles involved when it said that "[t]o give effect to the PLRA's fees limitations, after the fact, would 'attach new legal consequences' to completed conduct." *Id.* (*citing*, *Landgraf*, at 270, 114 S.Ct. 1483). The Court in *Martin* did not in any way limit the scope of its retroactivity analysis in *Landgraf* to merely reliance, although the consideration was clearly important to its deliberations.

In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871 (1997), the Court said that retroactive application of an 1986 amendment, which eliminated certain defenses to *qui tam* suits and, consequently, could revive the government's claims,

would have the effect of impermissibly subjecting the petitioner to previously foreclosed *qui tam* litigation. *Id.*, at 950, 117 S.Ct. at 1871. The Court's argument supporting this conclusion relied upon the principle that it was similar to extending a statute of limitations which would impermissibly "alter the substantive rights of a party and increase a party's liability." *Id.* There is no mention of reliance at all.

In *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240 (2004) the Court held that the Foreign Sovereign Immunities Act of 1976 did not provide a basis for petitioners to recover paintings held by the Austrian government which were originally taken by the Nazis. That holding was based upon Congress' clear intent that the claims under the Act should only be covered by the Act "henceforth." *Id.*, at 697, S.Ct. at 2252. The Court held that its decision in *Landgraf* was informative, referring to the presumption against retroactivity. *Id.*, at 696, S.Ct. at 2252. The Act overcame that presumption with the clarity with which Congress intended that it apply to past conduct. In its discussion on this presumption, the Court said, in reference to a private parties interest in litigation, that "[t]he aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Id.* This reference to reliance, however, was not central to the Court's analysis and, further, the Court did not disregard the other aspects of *Landgraf*'s default rule that "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with

respect to transactions already completed." *Id.*, at 694, S.Ct. at 2250 – 51.

In *Fernandez-Vargas v. Gonzales*, ___ U.S. ___, 121 S.Ct. 2422 (2006), the Court dealt again with an assertion of retroactivity under the INA. The new statute, §241(a)(5), stripped aliens of a right to a hearing if the alien illegally returned to the U.S. after an order of deportation was entered. *Id.*, at ___, 121 S.Ct. at 2425:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. §1231(a)(5), INA §241(a)(5), (West, 2006). But prior to the enactment of IIRIRA in 1996, the previously applicable provision, §241(f), only reinstated the order of removal in cases where the person wilfully avoided deportation and was convicted of it. 8 U.S.C. §1252(f), INA §241(f), (West 1995). All others could have been placed in removal proceedings again and could reassert any defenses they may have had. *See, Fernandez-Vargas*, at __, 121 S.Ct. at 2426. In *Fernandez-Vargas*, the petitioner had illegally reentered the U.S. before IIRIRA's effective date of April 1, 1997, and asserted that the new provision should not be applied to him.

The Court decided the question without reaching the second prong of the *Landgraf* analysis, because,

according to the Court, "[c]ommon principles of statutory interpretation fail to unsettle the apparent application of §241(a)(5) to any reentrant present in the country, whatever the date of return." *Id.* at ___, 121 S.Ct. at 2430. In light of the language of the new provision, *i.e.*, that it would apply "under the prior order at any time of reentry," the Court held that it was the choice the non-citizen made to remain in the country illegally which "subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Id.* at ___, 121 S.Ct. at 2432. The Court discussed the fact that the respondent in *St. Cyr* had presumably relied upon the prior law by his plea of guilty, but only to contrast it with the petitioner's case in *Fernandez-Vargas*, saying that the illegal reentry itself is not punished in the provision, but the non-citizen's continued presence made the statute applicable, not some past criminal act, as was the case in *St. Cyr*. *Fernandez-Vargas*, at ___, 121 S.Ct. at 2432.

As this Court's precedent decisions demonstrate, the courts of appeals in the majority have misinterpreted the import of this Court's decision in *St. Cyr*. Indeed, three courts of appeals have required "actual" reliance prior to finding that the new law would be impermissibly retroactive, if there was no plea of guilty entered. Courts will frequently make presumptions of law because they are necessary to the efficient administration of the law, disposing of time-consuming evidentiary hearings. Certainly, the Court in *St. Cyr* created a presumption when it held that an alien who plead guilty would be presumed to have relied on prior law. If the majority of the courts of appeals are correct in their reading of *St. Cyr*, however, it would not be inconsistent to draw the conclusion that *St. Cyr* imposes a requirement that the

alien demonstrate "actual" or subjective reliance, either by way of a plea of guilty – the easiest way – or some other way.[2]

Two courts of appeals have recently taken the reliance interest requirement in this direction by requiring that aliens demonstrate actual "individualized" reliance on the prior law. *Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007), *Wilson v. Gonzales*, 471 F.3d 111 (2nd Cir. 2006), *Restrepo v. Gonzales*, 369 F.3d 627 (2nd Cir. 2004). In *Wilson* the court held that if "the record demonstrates that Wilson reasonably relied on the continued availability of §212(c) relief and, based on that reasonable reliance, intentionally forwent filing an application for §212(c) relief until a later date in the hopes of presenting a stronger application," then he would be entitled to relief if he makes "an individualized showing of reliance." *Id.* The court of appeals made this decision in light of its previous decision in *Restrepo v.*

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[2] Some courts of appeals have analyzed, at length, whether *St. Cyr* requires objective reliance or subjective reliance; this inquiry, however, does not make much sense because presumptions of law generally obviate the need for evidence and *St. Cyr* clearly never proposed that a certain type of evidence is required. *See, Hernandez de Anderson v. Gonzales*, __ F.3d __, 2007 WL 2264698 (9th Cir. 2007). In *St. Cyr* the Court said that the plea of guilty was sufficient evidence of reliance. But if some evidence is always required, as the majority of courts of appeals have proposed, it necessarily follows without question that once a court commands the production of some kind of evidence, it must be relative to that particular person, and it will be, naturally, actual and/or subjective. And a court thereafter may judge the degree to which it will consider the evidence sufficient with respect to the presumptions or inferences that flow from it, but it will always be actual and/or subjective.

Gonzales, 369 F.3d 627 (2nd Cir. 2004), where the court held that

> We deem it wise to let the district court decide, in the first instance, whether an alien such as Petitioner must make an individualized showing that he decided to forgo an opportunity to file for a 212(c) relief in reliance on his ability to file at a later date (and, if he must, whether Petitioner can do so), or whether, instead, a categorical presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate.

Id. at 639. *See, also, Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007) (case remanded where petitioner claimed that she withheld filing for a §212(c) waiver on the basis that she was attempting to create stronger record of rehabilitation), *Hernandez de Anderson v. Gonzales*, – F.3d –, 2007 WL2264698 (9th Cir. 2007) (reasonable reliance demonstrated by the filing of a naturalization application in 1995, prior to the effective date of IIRIRA, with respect to offense pre-dating IIRIRA.)

B. Requiring "Actual" Reliance Will Render Absurd Results and Place An Additional Unnecessary Burden Upon the Courts.

Requiring actual reliance will render absurd results and place an additional burden on the courts, which the changes brought by Congress by IIRIRA clearly sought to avoid. For example, the court in *Restrepo* declined to consider the Government's argument that waiting to file it is not a decision compelled by reliance, but by necessity. *See, Restrepo*, 638, n.19. As acknowledged by the court

there, a §212(c) application may be filed "prior to, at the time of, or at any time after the applicant's arrival into the United States." *Id.* It can hardly be expected, however, that any alien would file a waiver application without first being placed into proceedings. Thus, any assertion that an alien waited until proceedings is wholly fiction. It is akin to a person who committed a criminal offense turning himself in – although it is known to happen – in light of human nature, it is very unlikely.

C. Requiring a Plea of Guilty Undermines the Right to Trial under the Sixth Amendment.

Further, requiring reliance by way of a plea of guilty infers that exercising one's right to trial is not inviolable. A criminal defendant, under the Sixth Amendment of the United States Constitution, is entitled to "the right to a speedy and public trial, by an impartial jury . . . ." If the majority is correct, requiring reliance, usually in the form of a plea of guilty to the offense, simply sends the wrong message about exercising one's right to trial against criminal charges. In *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), the Court said with respect to this right that

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Duncan, at 156, 88 S.Ct. 1444. And, where the courts of appeals are insisting that an alien plea guilty in order to be entitled to a benefit under prior law will carry the inference that it also applies to the future conduct.

D. The Real Focus is Congress' Intent, not the Intent of the Parties

Besides casting doubt on the right to a jury trial, requiring reliance also disturbs the focus concerning the retroactivity analysis as a whole. In *Olatunji*, the court of appeals articulated the problem as follows:

> Justice Story's formulation, which the Supreme Court has consistently relied upon, asks only whether a statute *in fact* has a retroactive effect, and we would ask no more. If the presumption is that Congress does not intend statutes to operate retroactively (and that is the presumption we indulge), then it follows that if a statute does *in fact* impose new legal consequences on past actions, Congress did not intend such. Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent – the very basis for the presumption against statutory retroactivity. . . . [I]t is an another altogether [presumption] to indulge the quite different, and unsupported and unsupportable, presumption that Congress so intends, but only where the particular petitioning party can prove that he subjectively relied on the prior statute to his detriment.

Olatunji, at 394 (emphasis in original). The focus should be upon Congress' intent in drafting the statute not the

party seeking to avoid the retroactive application of a new statute. The court accurately pointed out that it is unsupportable to shift the burden to a party's intent when the intent of Congress is the real focus.

In sum, *St. Cyr* should not be construed to uphold reliance as a condition precedent on equal par with the proposition that a statute is impermissibly retroactive which "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed . . . ." *Landgraf.*, at 280, 114 S.Ct. 1483. In *St. Cyr* the Court merely decided the case before it and stated that where the alien plead guilty to his offense, it demonstrated a "severe and obvious retroactive effect" to apply the new law. *St. Cyr* should not be read to preclude the application of this Court's precedent in Petitioner's case, namely, that IIRIRA either "impair[ed] [his] rights [when he] acted," and/or "increase[d] [his] liability for past conduct." *Landgraf.*, at 280, 114 S.Ct. 1483.

III. Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

James C. Ten Broeck Jr.
Counsel for Petitioner

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 17, 2007
Decided July 16, 2007

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 06-2742
FRANCISCO C. ZAMORA
Petitioner,
v.

ALBERTO R. GONZALES, Attorney
General of the United States,
Respondent.

O R D E R

Francisco Zamora, a permanent resident since 1985, took a brief trip to his native Mexico in 2001 and was denied readmission based on his prior Illinois convictions for possessing a stolen car in 1990 and possessing cocaine in 1995. At his removal hearing, Zamora requested a waiver of inadmissability based on former INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed), arguing that its repeal should not apply retroactively. Relying on *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Supreme Court held that an alien who pleaded guilty to an aggravated felony prior to the repeal of § 212(c) remains eligible for discretionary relief, the IJ denied Zamora's request because he had not pleaded guilty to the cocaine charge. The BIA affirmed. Zamora now petitions for review, arguing that it would be impermissibly retroactive to apply the repeal of § 212(c) to him, regardless of whether he actually relied on the prior law. We deny the petition for review.

Zamora was admitted as a lawful permanent resident in 1985. He has two United States citizen children, aged 23 and 8, and two grandchildren. He has been employed as a machinist at Advance Wheel Corporation in Chicago since 1989, and he serves as an usher for his church. Unfortunately, Zamora also has two criminal convictions: in 1990 he pleaded guilty to possessing a stolen car, see 95.5 Ill. Comp. Stat. Ann. 4-103-A(1) (West 1990), and was sentenced to 24 months' probation; and in 1995 he unsuccessfully contested a charge of possessing less than 15 grams of cocaine, see 720 Ill. Comp. Stat. Ann. 570/402(c) (West 1994); he was again sentenced to 24 months' probation.

At his removal hearing, which was delayed until 2005, the IJ found him removable based on his convictions for a crime of moral turpitude (possessing a stolen car), see 8 U.S.C. § 1182(a)(2)(A)(i)(I), and a controlled substance

offense (possessing cocaine), *see id.* § 1182(a)(2)(A)(i)(II). Zamora argued that he should remain eligible for a discretionary waiver under former INA § 212(c) because his convictions predated the repeal of that statute. The IJ disagreed, saying that Zamora could not demonstrate that the elimination of § 212(c) relief is impermissibly retroactive because he pleaded not guilty and went to trial on the cocaine possession charge. Zamora appealed to the BIA, contesting, among other things, his ineligibility for a § 212(c) waiver. The BIA affirmed, explaining that under this and other circuits' precedent, Zamora's plea of not guilty precludes him from establishing impermissible retroactivity. Zamora timely filed this petition for review.

Zamora now argues that St. Cyr does not require him to demonstrate his reliance on INA § 212(c) to show that applying the repeal to him is impermissibly retroactive. He says that the appropriate test for impermissible retroactivity, established in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), is whether the repeal "would impair rights [he] possessed when he acted" or "increase [his] liability for past conduct."

We review de novo an alien's claim of impermissible retroactivity. *See Valere v. Gonzales*, 473 F.3d 757, 761 (7th Cir. 2007). Determining retroactivity is a matter of statutory interpretation, and "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *St. Cyr.*, 533 U.S. at 315-16 (citation and quotation marks omitted); *see Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2428 (2006). Where Congress's intent is ambiguous, we ask whether applying the new law would produce an impermissible retroactive effect. *St. Cyr*, 533 U.S. at 320. That inquiry "demands a commonsense, functional

judgment about whether the new provision attaches new legal consequences to events completed before its enactment," and "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 321 (citations and quotation marks omitted).

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), the Attorney General possessed the authority under § 212(c) of the Immigration and Nationality Act to grant discretionary waivers of deportation to aliens who met certain criteria. AEDPA placed new limits on this authority in 1996, and in 1997 IIRIRA repealed § 212(c) altogether, replacing it with a similar form of relief called "cancellation of removal." *See* 8 U.S.C. § 1229b(a). Unlike § 212(c), however, the new provision makes aliens convicted of an aggravated felony ineligible for relief. See id. (Zamora notes, and the government does not dispute, that neither of his offenses are aggravated felonies. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (simple possession of a controlled substance is not an aggravated felony); 8 U.S.C. § 1101(a)(43)(G) (theft offense for which prison sentence is less than one year is not an aggravated felony).) The new law also requires an alien to have "resided in the United States continuously for 7 years after having been admitted in any status," *see* 8 U.S.C. § 1229b(a), and an alien's commission of a crime of moral turpitude ends that continuous residence. *See* 8 U.S.C. § 1229b(d). (We note that cancellation of removal does not appear to be an option for Zamora. According to his attorney, he is ineligible for cancellation of removal because he committed a crime of moral turpitude less than seven years after his admission (he possessed a stolen car in 1990). Thus, he cannot meet the new

continuous residence requirement. *See* 8 U.S.C. § 1229b(d). In any event, Zamora did not apply for cancellation of removal.)

In *St. Cyr*, the Supreme Court held that Congress did not unambiguously intend IIRIRA's repeal of § 212(c) to apply retroactively. *See* 533 U.S. at 320. The Court then analyzed whether the repeal of § 212(c) is impermissibly retroactive when applied to aliens, like St. Cyr, who pleaded guilty to an aggravated felony prior to the repeal. *See id.* The Court concluded that because people who pleaded guilty "almost certainly relied upon [the likelihood of receiving § 212(c) relief] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." Id. at 325. The Court emphasized the *quid pro quo* involved in plea agreements, explaining that, because aliens like St. Cyr gave up their right to contest charges at trial and the government benefitted from their plea agreements, "it would surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations, to hold that IIRIRA's subsequent restrictions deprive [them] of any possibility of such relief." *Id.* at 323-24 (citation and quotation marks omitted).

We have since foreclosed the possibility of § 212(c) relief for an alien who did not plead guilty to an aggravated felony prior to IIRIRA, reasoning that he "did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief." *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004) (per curiam) (*citing Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2001); *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)). And the vast majority of circuits similarly have rejected arguments for § 212(c) relief brought by aliens

who contested at trial the crimes that now render them ineligible for cancellation of removal. *See Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006), *cert. denied*, 2006 U.S. LEXIS 5697 (Oct. 2, 2006); *United States v. Zuniga-Guerrero*, 460 F.3d 733, 737-39 (6th Cir. 2006), *cert. denied*, 2007 U.S. LEXIS 521 (Jan. 8, 2007); *Alexandre v. U.S. Attorney Gen.*, 452 F.3d 1204, 1207 (11th Cir. 2006) (per curiam); *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) (per curiam), *cert. denied*, 2003 U.S. LEXIS 4615 (June 16, 2003); *Chambers v. Reno*, 307 F.3d 284, 293 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002).

Not all circuits, however, view the existence of a guilty plea as the *sina qua non* of a retroactivity claim after *St. Cyr*. For example, the Second Circuit has said that an alien can demonstrate reliance, notwithstanding his plea of not guilty, by showing that he delayed submitting a § 212(c) application to build a stronger case of rehabilitation from his criminal past. *See Restrepo v. McElroy*, 369 F.3d 627, 634-35 (2d Cir. 2004). The Third Circuit has held that aliens who go to trial may nevertheless "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them," if they turned down a plea agreement. *See Ponnapula v. Ashcroft*, 373 F.3d 480, 494 (3d Cir. 2004). And the Tenth Circuit has held that the repeal of § 212(c) does not apply to aliens who contest an aggravated felony charge but forego their right to appeal. *See Hem v. Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006).

Zamora does not argue that any of those exceptions apply to him. Instead he argues—without addressing our contrary precedent—that we should either reject a

reliance requirement or simply presume that he relied upon the prior state of the law. But like virtually every circuit that has addressed a post-*St. Cyr* retroactivity claim, reliance plays a central role in our retroactivity analysis. *See Montenegro*, 355 F.3d at 1037. In *Montenegro*, the alien had unsuccessfully contested the charge that he had possessed with the intent to deliver more than 900 grams of cocaine, an aggravated felony. *Id.* at 1036. *Citing Lara-Ruiz*, 241 F.3d at 945 (quoting *LaGuerre*, 164 F.3d at 1041), in which we explained that it would "border on the absurd" to argue that an alien "would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him," we refused to find impermissible retroactivity because Montenegro's plea of not guilty did not demonstrate reliance on his continued eligibility for § 212(c) relief. *Montenegro*, 355 F.3d at 1037. Even the Third and Tenth circuits, which Zamora cites because they reject the notion that actual reliance is required to show impermissible retroactivity, *see Ponnapula*, 373 F.3d at 491-94; Hem, 458 F.3d at 1196, analyzed whether it would have been objectively reasonable for the aliens in those cases to have relied on continued eligibility for § 212(c) relief, *see Ponnapula*, 373 F.3d at 494; *Hem*, 458 F.3d at 1197. Only the Fourth Circuit has wholly foresworn a reliance requirement, whether actual or objective. *See Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004).

Zamora argues that the only relevant question is whether IIRIRA impaired the rights he possessed at the time of his conviction or increased his liability for past convictions. But under that formulation all aliens convicted of crimes prior to IIRIRA who otherwise would have been eligible for § 212(c) relief would remain

eligible, regardless of how their convictions were obtained. Thus, Zamora's retroactivity test would render moot virtually all of the Supreme Court's analysis in *St. Cyr* and require us to overturn *Montenegro*. Zamora has not persuaded us to do so, nor has he argued for an exception to *Montenegro* that would be consistent with our precedent.

Accordingly, we DENY the petition for review.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. §1182(c), INA §212(c) (West. 1996)

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sections 304(b) & 309(a).

DIVISION C—ILLEGAL IMMIGRATION REFORM AND IMMIGRANT

RESPONSIBILITY ACT OF 1996

* * *

TITLE III—INSPECTION, APPREHENSION, DETENTION, ADJUDICATION, AND REMOVAL OF

INADMISSIBLE AND DEPORTABLE ALIENS

Subtitle A—Revision of Procedures for Removal of Aliens

* * *

Sec. 304. Removal proceedings; cancellation of removal and adjustment of status; voluntary departure (revised and new sections 239 to 240C).

* * *

(b) REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

* * *

Sec. 309. Effective Dates; Transition.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").